THE GOVERNANCE OF WAKAF LAND IN MALAYSIA AND INDONESIA: A COMPARATIVE PERSPECTIVE

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Abstract - Malaysia and Indonesia are two countries in South East Asia which Muslims form the majority of the population. As a majority they have secured many privileges especially in terms of laws and policies governing their religious matters. Wakaf is one of the aspects that come under religious matters that concern the Muslims and among the subject of wakaf is land i.e. immovable property. Both Malaysia and Indonesia have a huge value of land dedicated for wakaf and both countries have their own way of method of governing that wakaf due to the different system of ruling adopted by both countries, Malaysia as a constitutional monarchy and Indonesia as a republic which adopts a presidential system. This paper seeks to address the different between the two countries in governing the wakaf land.

Index Terms - Wakaf, governance, Malaysia, Indonesia, Islamic Law.

I. INTRODUCTION

Wakaf is defined as to prevent the property from becoming the possessory right of anybody and to devote its usufructs for a charitable or specific purpose specified by the founder. Originally pronounced in arabic as waqf (plural awqaf) and its literal meaning is 'prevention, confinement, detention or tying up. The other words used in Arabic as can be found in the literatures of Islamic law which having the same meaning as waqf are habs, tahbis, tasbil or sadaqa muharrama. Any property by its nature is a subject of circulation among the people by act of transferring the ownership from someone to another. However, when that property is detained from that circulation and confined in nobody's possession in a way that only its usufruct can be utilized, this property is called wakaf property. In Islamic law the basis of wakaf goes back to the time of the Prophet when Umar came to the Prophet seeking his opinion on pieces of land called Thamgh that he acquired in Khaybar. The Prophet replied to him: "If you like, you detain the things themself and devote their fruits to pious purpose". Umar did this declaring that "the land should neither be sold nor bequeathed"[1]. The meaning of this Tradition is that the property that are declared as wakaf cannot be the subject of any transaction or owned by anybody, even the founder himself, and only the usufruct goes to the beneficiaries. This nature of wakaf makes it status a sacrosant one and in modern states it needs a regulation to govern it, in different with any other type of property. This is why we find that in many Muslims countries there are specific laws, policies and fatwas issued to govern wakaf property. In the history of Islam wakaf has been a popular practice among the Muslims from the early Islam in Arabia and spread in all Muslims lands. Land is a common type of property that be made wakaf though other kind of property is also valid to be made wakaf.

II. THE ADMINISTRATION OF WAKAF LAND – FIQH PERSPECTIVE

The main features of the property that can be made wakaf is to have the quality of permanancy, termed in arabic as ta'bid. This is the position of the majority of jurists from the three schools of laws, namely, Hanafi, Shafi'e and Hanbali. These what have been derived from the hadith above when the Prophet said 'detain...." "Detain" or habs in arabic means that it must be something that have the quality of permanancy. Within this feature the Muslims jurists approved two categories of wakaf, namely, (i) immovables and (ii) movables. Immovables comprise of lands and houses, wheras movables can be in the forms of books, stationaries, weapons, trees, carpets etc. Movables such as candles, monies or perfumes cannot be subject of wakaf because they can be diminished with use, hence no quality of permanancy. May be among the easy available references on the reports of types of wakaf since the time of the Prophet up to the time of the tabi'in is Kitab Ahkam al Awqaf by al Khassaf [2]. From these reports we can see that the companions declared their properties as wakaf in types of lands, houses, gardens and wells for the benefits of mosques, peoples and their relatives.

The most popular types of wakaf is land. This may be because the first ever wakaf that was recognised by the

Prophet was land. i.e. the wakaf of land to build mosque of Quba' and the wakaf of land of Khaybar by Umar. Since then many companions made wakaf and through out the history of Islam many wakafs were land based wakaf, and have been devoted for mosques, educations, healths and public amenities.

In Islamic law a wakaf of a land take effect when a founder (waqif) declare his land as wakaf. By this declaration the ownership of the land is transferrred to nobody's possession, neither the founder nor the beneficiaries. The jurists termed it as "transferred to God". In that declaration the founder will make stipulations on how to manage that land and to whom or what the wakaf will benefit for. The beneficiaries of wakaf land can be an institution like mosques, schools, etc., specific group of people like the needys, student, scholars, etc., or specific individuals. A trustee, called mutawalli or nazir, must be appointed to manage that land in accordance with the stipulations set up by the founder. This is based on the hadith of Umar in which he appointed his daughter, Hafsa, as the trustee. Al Nawawi mentions in his al Majmu' that all the Companions who made wakaf would designate someone to manage it. According to Islamic law of wakaf the trustee is bound to follow and implement the founder's stipulations based on the fiqh maxim "Those stipulated by the founder of a wakaf just like those stipulated by God". According to the majority of the jurists any proposal to overrule the founder's stipulation must be brought to the qadhi and the qadhi can approve that proposal based on the maslaha (public interest). The trustee is entitled to get allowance from his duties in managing that land which is paid out from the proceeds of that wakaf on the reasonable basis. According to the majority of the jurists the founder is fully authorized to dismiss the trustee at any time without the trustee doing anything which would disqualify him.

A trustee must be of an honest, capable and competent person. He is entrusted to look after the wakaf land and to make sure that wakaf is taken care off. He is not only expected to preserve the wakaf but also to develop the wakaf so as to keep it beneficial to the benificiaries. Qadhi Khan listed the duties of the trustee as follow: "Edification, preservation of the waqf, leasing the property, planting, collecting the income of the waqf estate from its rent, crops and fruits, striving to increase its yields, distributing the proceeds among the objects of the waqf, repairing, paying its beneficiaries, taking all precautions to preserve the properties and their proceeds, hiring and firing, and handling all disputes and litigations" [3]. Since the purpose of a wakaf land is to give benefit to the beneficiaries a trustee can utilize the land in the way that can bring much proceeds to the beneficiries. Among the methods of utilizing the wakaf land which is agreed upon by the jurists is to lease the land for any purpose approved by Islamic law. If there is specific stipulation by the founder to lease the land the trustee must act in accordance to the stipulations. In accomplishing this, the trustee is obliged to follow all the details of the stipulation like period and rate of the lease. In cases of no express stipulations have been laid down or there has been a clear stipulation not to lease the wakaf land, the trustee is authorized to do it if he finds there is a necessity or maslaha in that. Al Bahuti observed that it had been the practice of all the qadhi through out the times to disregard the fixed period of lease as stipulated by the founder, when necessities demand [4].

Another method of utilizing the wakaf land is by way of Istibdal, that is, to buy a land in exchange to a wakaf land. Istibdal is acceptable in Hanafi and Hanbali school of laws and rejected by Maliki and Shafii school of laws. According to Hanafi and Hanbali school Istibdal is the lawful choice when the wakaf land does not function well like falls into deterioration or the value of the land declines with the passing years and therefore little profit can be derived from it. However the trustee must get an approval from the judge before proceed with istibdal. the role of the judge here is to ensure there is a valid basis to do istibdal. The fiqh issue in istibdal is that when the wakaf land is sold it contradicts the principle of perpetuity in wakaf as mentioned above. This is the basis of the rejection by the Maliki and Shafie school of laws. For the Hanafi and Hanbali school, they see that by selling the wakaf land and substituting it with another one which is more beneficial does not contravene the principle of perpetuity. Abu Zahrah explains that perpetuity cannot be seen as the physical existence only, but maintaining the usufruct to keep giving benefit to the beneficiaries is also considered to have the quality of perpetuity [5].

This is, in general, the classical fiqh structure on the administration of wakaf land. The modern application of this structure is embodied in the regulations and policies of the states and countries that govern the wakaf land with some innovations and modifiations to suit the modern needs and demands.

III. GOVERNANCE OF WAKAF LAND IN MALAYSIA AND INDONESIA

Malaysia and Indonesia are two countries in South East Asia which Muslims form the majority of the population. Both countries have laws and policies governing their religious matters and wakaf is one of the aspects that come under religious matters. The prime subject of wakaf is land i.e. immovable property. Both Malaysia and Indonesia have a huge value of land dedicated for wakaf and both countries have their own way of method of governing that wakaf due to the different system of ruling adopted by both countries, Malaysia as a constitutional monarchy and Indonesia as a republic which adopts a presidential system.

IV. MALAYSIA

Malaysia comprise of 14 states and the governing law is mostly based on English Common law. However the law relating to personal law, which is wakaf is part of it, is in principle based on Islamic law. The Federal Constitution of Malaysia scopes the Islamic law within the provisions under Article 1 of Ninth Schedule, List II-State List for the state level. The list clearly covers, among others, matters relating wakaf. This is to effect that by law the muslims endowment is come under the state control, not at the federal level. The state will have power to legislate matters come under this list as provided in article 74 (1)(2) of the Federal Contitution. However for the Federal Territories, which are 3 out 14 states, the power of legislation is under the Federal authorities

Every state has their own law governing the administration of the wakaf. The governing law are named as Administration of Islamic Law Enactment in Johor (1978), Kedah (1962), Mallaca (1991), Pahang (1991), Perak (1992), Perlis (1993) and Sabah (1992). In Kelantan (1994) the governing law is named as Council For The Religion of Islam and Malay Custom Enactment, in Serawak (1954) named as Majlis Islam (Incorporation Ordinance), in Terengganu (1986) known as Administration of Islamic Religious Affairs Enactment, and Federal Territories of Kuala Lumpur, Labuan and Putrajaya known as Administration of Islamic Law Enactment (Federal Territories) Act, 1993.

These enactments, ordinance and act are the law that govern matters come under the state's jurisdiction as provided by Federal Constitution of Malaysia. It includes wakaf, family law, succession, etc. Among these states there are 3 states that legislate the specific governing law on wakaf. They are the states of Selangor, Malacca and Negeri Sembilan. The enacments are Wakaf (State of Selangor) Enactment 1999, Wakaf (State of Malacca) Enactment 2005 and Wakaf (Negeri Sembilan) Enactment 2005. Unlike the other states these three states, with the specific enactments on muslims endowments, they provide details of aspect of administration of muslims endowment and more substantive in nature. They cover matters relating to formation of wakaf, beneficiaries, subject of wakaf, exchange of wakaf propetry and the powers of trustee, offences and penalties, enforcement and investigation, etc. In the other states wakaf are less elaborated and confined to the administrative aspects [6].

At the state level the trusteeship of a wakaf is vested upon the Majlis Agama Islam or State Islamic Religious Council (SIRC). This body is constituted under the provisions of the Islamic legislations of each state passed by legislative assemblies and for the Federal Territories by the Parliament. The function of SIRC is to aid the Ruler (Sultan) and advise him on matters relating to Islam and Malay customs in the state. All the state provides in their legislation that the Majlis is the sole trustee for all the muslims endowed property. The state of Selangor, for example, provide in Section 32 Wakaf (State of Selangor) Enactment 1999: "Notwithstanding any provision to the contrary contained in any instruments or declaration creating, governing or affecting any wakaf, the Majlis shall be the sole trustee of all wakaf, whether wakaf am or khas, situated in the State of Selangor". This give effect that the Majlis has the powers and rights in overseeing and managing the wakaf property and also in developing the property. In exercising this the Majlis is expected to administer the property in accordance with the stipulation of the founder. If for example the original wakaf is declared for the benefit of the mosque, the Majlis should act in accordance with that stipulation. Any income should be distributed to the mosque and not considered as an income to the Majlis.

If in certain situation the Majlis need to develop the wakaf land the Majlis have to refer the matter to the State Fatwa Committee which later will be holding the meeting to decide whether to approve or disapprove the proposal in accordance with Islamic law. In making the decision the Fatwa Committee will normally following the rulings of the four sunni schools of law or will execise their capacity as the highest authority in fatwa to decide in accordance with the public interest.

Though the endowment comes under the state's jurisdiction, at the Federal level efforts have been done to assist the states in developing the endowments. In 2004 the Department of Wakaf, Zakat and Haji (JAWHAR) has been established and parked under the Prime Minister's office. This department is to coordinate and facilitate the states in planning and managing the endowed property at the state level. However this department has no executive rights to interfere in the state's decision.

V. INDONESIA

Indonesia as a big country and have nearly 200 million muslims in population enjoy a vast wakaf lands. Article 215 no. 1 of complitaion of Islamic Law of Republic of Indonesia defines wakaf as a legal action by someone or a group of people or legal entity to separate the property owned and put it for religious purpose for the entire time or for another public needs based on Islam. Data from Indonesia Wakaf Board in 2016 shows that wakaf land in Indonesia in total is 4,359,443,170 Square Metres spread in 33 provinces [7]. According to a survey conducted by Center for the Study of Religion and Culture in 2006 79% of the wakaf land is for the mosques and musallas, 55% for the education purpose and 9% for the graveyards [8].

The latest development in the governance of wakaf

land in Indonesia is that the wakaf land regulated by Law No. 41 of 2004 of Wakaf in Indonesia. The law mark the political will of the goverment to look after wakaf asset in Indonesia and to expand the wakaf asset not only to the land but also to the movables asset. The new act regulates some crucial matters relating to wakaf administration such as the roles and responsibilities of mutawalli, types of waqf assets, the allotment of wakaf assets, as well as the establishment of Indonesian Wakaf Board. Hidayatul Ihsan assert that these themes are important as these matters have never been the subject of any previous wakaf regulations in Indonesia and it reflects the willingness of Indonesian government to give more attention to improve wakaf management in Indonesia [9].

A considerable attention has been given to the mutawalli or nazir. Article 1 points (4) of Law No. 41 of 2004 on wakaf mandates that an institution or person in charge on receiving wakaf from founder tasked to manage the land which is generally called as Nazir. Nazir role is to maintain and manage the wakaf land in accordance with the purpose of wakaf mandated by the founder. In section 11, it is stated that mutawalli or nazir has responsibilities to administer all wakaf assets, to manage and develop wakaf properties in line with the objective of its establishment, to control and protect wakaf assets and to report their performance and activities to the Indonesian Wakaf Board. Indonesian Wakaf Board has been established by the mandate of this act [8]. In section 49 of the Act, the roles and functions of the Board is mentioned as to train and educate mutawalli in managing waqf assets, to manage and develop any national and international waqf assets, to authorize any change with regard to the status of waqf assets, to determinate and change mutawalli, to give approval for any change in wakaf assets, and to give suggestions to the government pertaining to wakaf matters in Indonesia.

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